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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1350

UNITED TRANSPORTATION UNION,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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1. The Brief in Opposition does not substantially disagree with the basis for the first reason advanced by Petitioner, hereinafter the "Union", for the Writ of Certiorari to be granted—that the court below had jurisdiction of the Union's appeal from the district court's judgment denying enforcement of the Award and Order of the National Railroad Adjustment Board, hereinafter "NRAB", and should have decided the question.

Respondent, hereinafter the "Railroad", agrees (Br. 1, 7, 15-16) that the composite decision of the district court consisted of three distinct decisions: (1) denial of the union's motion for summary judgment enforcing the award of the NRAB; (2) denial of the railroad's motion for summary judgment setting aside the Award of the NRAB and dismissing the complaint; and (3) remanding the dispute to the NRAB for re-arbitration as stated by petitioner (Ptn. 10-11, 14-15). As the case stood in the district court when it made those orders it presented only a question of law since the motions of both the union and railroad represented that there was no genuine issue as to any material fact.

The railroad argues (Br. 8-9) that, if the remand order is put aside, all that would remain of the district court's judgment would be two orders which the railroad asserts would be "interlocutory orders"—one denying the union's motion to enforce the award and the other denying the railroad's motion to set aside the award and to dismiss the complaint, neither of which would be subject to appeal.

But the railroad also states (Br. 9) that if the district court had held the Award and Order of the NRAB to be void and unenforceable on the railroad's motion there would have been nothing to remand and that what the district court held was not that the Award and Order were void and unenforceable but rather that the NRAB had not rendered an award and order that complied with the requirements of the Railway Labor Act, hereinafter "RLA", which could be enforced or set aside.

Notwithstanding those statements by the railroad, what the district court did was to deny the union's motion to enforce the award on the ground the NRAB had failed to comply with the requirements of the RLA in making the award and, upon the same ground, remanded the dispute to the board. Ptn. App. B, pp. A-9–A-13.

Thus it is apparent that after the district court's denial of enforcement of the award on one of the grounds specified by subsections (p) and (q) of Section 3 First of the RLA, 45 USC 153 First (p) and (q), there was, as the railroad states, "nothing to remand" (Br. 9).

Clearly, the court below had jurisdiction of the union's appeal from the district court's judgment denying enforcement of the award and, if it had found the district court eroneously denied enforcement of the award, it would never have reached the remand question, as shown in the Petition at pages 15-16.

2. The Brief in Opposition further emphasizes the necessity for this Court to determine the question with respect to appellate review of remand orders, to avoid the injustice which otherwise will be done to railroads and their employees if the decisions of the court below and of the majority of the Court of Appeals for the Eighth Circuit in *Transportation-Communication Employees Union v. St. Louis-San Francisco R. Co.*, 419 F.2d 933 (1969), *cert den.*, ... U.S. ..., 91 S.Ct. 34 (1970), hereinafter referred to as the *Frisco* case, are allowed to stand.

Throughout its Brief in Opposition, the railroad advances arguments which presuppose that the district court acquired continuing jurisdiction of the arbitration of the basic dispute, such as district courts have of arbitration under the United States Arbitration Act and as the courts have under the Social Security Act of decisions of the Secretary of Health, Education & Welfare.

The basic dispute between the parties was whether the railroad violated the collective agreement in discharging its employee and whether the employee should be reinstated and paid for time lost in accordance with the provisions of the collective agreement. Such was the dispute that was submitted to the NRAB which found and made an award in favor of the employee (Ptn. App. C, pp. A

14-A 19; *Union Pacific R. Co. v. Price,* 360 U.S. 601 at 606-607 (1959)).

Since the NRAB had made such an award, the basic dispute has evolved into a dispute whether the courts should enforce or set aside the award or require the basic dispute to be re-arbitrated by the NRAB under the decision of this Court in *Gunther v. San Diego & Eastern R. Co.,* 382 U.S. 257 (1965) and subsections (p) and (q) of Section 3 First of the RLA, 45 USC 153 First (p) and (q), (1971 Supp.).

Decisions in cases arising under the United States Arbitration Act are partly the basis for the decision of the majority of the court in the *Frisco* case (419 F.2d at 935-6), for the decision of the court below in this case (Ptn. App. A, pp. A 3 to A 4, 433 F.2d at 568) and for the railroads' argument (Br. 13-17) that the district court's order in this case is not subject to appellate review.

However, the court below, the majority of the court in the *Frisco* case and Respondent ignore the other provisions of the United States Arbitration Act which provide for the entry of a final judgment (9 USC 11-13) which clearly would be subject to appellate review. In an appeal from such final judgment the orders held interlocutory and not subject to appellate review—in the cases relied upon by the court below, the majority of the court in the *Frisco* case and by the railroad in its Brief in Opposition—clearly would be subject to appellate review and correction if found to have been erroneous. *Mesabi Iron Co. v. Reserve Mining Co.,* 270 F.2d 567, 569 (8th Cir. 1959).

Thus, under the United States Arbitration Act, a party losing the benefit of an arbitration award as the result of an erroneous, unappealable, interlocutory order requiring re-arbitration, could recover the benefit of such award. See *Stathatos v. Arnold Bernstein S.S. Corp.,* 202 F.2d 525 (2d Cir. 1953) and *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (9th Cir. 1934).

Likewise, decisions arising under the Social Security Act are also partly the basis for the decision of the court below in this case (Ptn. App. A, pp. A 3; 433 F.2d at 568) and for the decision of the majority of the court in the *Frisco* case (419 F.2d at 933), on which the railroad relies (Br. 10-11, 16-17) for the proposition that the district court's remand order in this case is not subject to appellate review.

However, the court below, the majority of the court in the *Frisco* case and the railroad in its Brief in Opposition in this case ignore the provisions of the Social Security Act, 42 USC 405 (q) (Ptn. App. A, pp. A 27, A 28), for the court to enter a judgment which "shall be subject to review in the same manner as a judgment in other civil actions". Thus, under the Social Security Act, as under the United States Arbitration Act, erroneous, interim, unappealable decisions remanding questions to the Secretary of Health, Education & Welfare may be reviewed and corrected in an appeal from such judgment.

Clearly, Congress intended remand orders, which it introduced into the RLA in 1966 by subsection (q) of Section 3 First of the Act, to be subject to appellate review by providing, in the last sentence of subsection (q) that judgments of district courts affirming awards of the NRAB, setting aside such awards in whole or in part or remanding proceedings to the NRAB "shall be subject to review as provided in Sections 1291 and 1254 of Title 28".

If decisions arising under the United States Arbitration Act and Social Security Act are to be relied upon as the basis for denying appellate review of remand orders under the RLA, then the *complete scheme and all of the provisions of the United States Arbitration Act and of the Social Security Act* should be held applicable to the arbitration of minor disputes under the RLA, to provide for appellate review of orders of district courts remanding

disputes to the NRAB for re-arbitration or else effect should be given the last sentence of subsection (q) of Section 3 First of the RLA which the court below and the majority of the court in the *Frisco* case declined to do and, in so declining, insulated such remand order from appellate review as shown in the Petition, pp. 20-22.

It would be more accurate and appropriate under the provisions of the RLA to treat remand orders made by district courts under subsections (p) and (q) of Section 3 First of the RLA as appealable orders directing arbitration, as such orders are held to be under *Goodall-Sanford, Inc. v. United Textile Workers of America*, 353 U.S. 550 (1957) rather than to apply decisions arising under the United States Arbitration Act or the Social Security Act.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and in this Reply to the Brief in Opposition, the Writ of Certiorari should be granted and (1) the judgment of the court below vacated and the case remanded with directions to the court below to determine the merits of the union's appeal, or (2) for the merits of the judgment of the court below to be determined by this Court upon briefs and arguments of the parties.

Respectfully submitted

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March 17, 1971.